

Office of the Attorney General  
State of North Dakota

Opinion No. 84-10

Date Issued: February 6, 1984

Requested by: Ben Meier  
Secretary of State

--QUESTION PRESENTED--

Whether the Emergency Commission has the authority to authorize institutions of higher education to expend carry-over income deposited in their special revenue accounts established in Section 15-10-12 of the North Dakota Century Code, when such revenue is in excess of the estimated income projected in the biennial appropriations bills for those institutions.

--ATTORNEY GENERAL'S OPINION--

It is my opinion that the Emergency Commission has the authority to authorize institutions of higher education to expend carry-over income deposited in their special revenue accounts established in Section 15-10-12, N.D.C.C., when such revenue is in excess of the estimated income projected in the biennial appropriations bills for those institutions.

--ANALYSIS--

The Emergency Commission of the State of North Dakota is established pursuant to Chapter 54-16, N.D.C.C. Section 54-16-03, N.D.C.C., prohibits state agencies from spending more money than that which is appropriated (see also Art. X, § 12, N.D. Const.) without Emergency Commission approval. Section 54-16-04, N.D.C.C., authorizes the Emergency Commission to approve transfers between funds or a direct draw on the State treasury in 'emergencies.' Other sections of Chapter 54-16, N.D.C.C., grant additional authority to the Emergency Commission but are not relevant to this issue (see, e.g., Sections 54-16-04.1, 54-16-11.1, and 54-16-12, N.D.C.C.).

In addition to Chapter 54-16, N.D.C.C., biennial appropriations acts may expand the authority of the Commission. 1983 N.D. Sess. Laws 5, which contains the appropriation for institutions of higher education for the 1983-85 biennium, provides in Section 4:

SECTION 4. ADDITIONAL INCOME. Any additional income not required by law to be deposited in the operating fund in the state treasury and income from increased enrollments is hereby appropriated. All income

resulting from increased enrollments in excess of estimated income in the budget appropriated by the legislative assembly to the institutions of higher learning must be deposited in their operating funds in the state treasury and can be expended only by authorization of the emergency commission.

The board of higher education is hereby authorized to use operating funds in addition to appropriated plant improvement funds for the maintenance, repair, and improvement of buildings and land acquisition at the various institutions, with consent of the emergency commission during the biennium beginning July 1, 1983, and ending June 30, 1985. [Emphasis supplied.]

The provision of Section 4 authorizing the Emergency Commission to approve expenditure of excess income resulting from increased enrollments would appear to be in conflict with Section 54-16-03, N.D.C.C., which states, in part, as follows:

The emergency commission shall not approve an expenditure of institutional income, other than gifts or grants, in excess of the institutional income appropriated to the institution by the legislative assembly.

However, it is my opinion that Section 4 has effectively amended Section 54-16-03, N.D.C.C., as its passage is later in time than the prohibition in Section 54-16-03, N.D.C.C. See Sections 1-02-07, 1-02-08, and 1-02-09, N.D.C.C.

Section 4 of 1983 N.D. Sess. Laws 5 provides considerable authority to the Emergency Commission to approve a request by an institution of higher education for additional faculty positions and for improvements to its buildings. To the extent that the excess income results from increased enrollments, Section 4 authorizes Emergency Commission approval. There is nothing in Section 4 which would indicate that the increased enrollment revenue must have occurred in the 1983-85 biennium. To the extent that a request of an institution of higher education deals with facilities improvements, the second paragraph of Section 4 would grant the necessary authorization. That section states that 'operating funds in addition to appropriated plant improvement funds' can be used for improvements to buildings. The terms 'operating fund' and 'operating funds' are also used in the first paragraph of Section 4. That term appears to refer to the special revenue account established in Section 15-10-12, N.D.C.C. Because the income to be used in an institution of higher education's Emergency Commission request is required by law to be deposited in its 'operating fund in the state treasury,' the second paragraph provides authorization for Emergency Commission approval of physical plant improvements.

A question still remains concerning Emergency Commission authority to approve carry-over funds not a result of increased enrollments which would be used to hire additional faculty, i.e., not used for a plant improvement. The authority for Emergency Commission approval of such amounts is found in Section 54-16-03, N.D.C.C.

Section 54-16-03, N.D.C.C., provides authority for the Emergency Commission to approve expenditures of excess fund. The limitation on approval of excess institutional income does not apply if the institutional income has been appropriated by the Legislative Assembly. Section 15-10-12, N.D.C.C., in effect appropriates the money in the special revenue funds of the institutions to the institution.

This result is supported by precedent. In an opinion issued on September 13, 1963, to the then Director of Accounts and Purchases, this office was attempting to harmonize Section 15-03-03, N.D.C.C., providing that the state treasurer is to have custody of certain school funds, with § 186 (now Art. X, § 12, N.D. Const.). The Attorney General held that Section 15-03-03, N.D.C.C., 'can only now be treated as an appropriation.' 1963 N.D. Atty Gen. Op. p. 8. Section 15-03-03, N.D.C.C., which provided for separate funds for the institution and provided for exclusive use by the institution was held to be an appropriation.

The same logic can be applied to Section 15-10-12, N.D.C.C., which sets aside a special fund in the state treasury which can only be used for the institution. Since Section 15-10-12, N.D.C.C., is an appropriation of the carry-over funds, there is no prohibition against the Emergency Commission approving the expenditure of those funds pursuant to Section 54-16-03, N.D.C.C. The prohibition in Section 54-16-03, N.D.C.C., against the Emergency Commission approving expenditure of excess institutional income would not apply since that income is, in effect, appropriated. This office, in an opinion dated December 12, 1979, to Senator Herschel Lashkowitz involving the question of what funds were to be included in deriving the general fund balance used to trigger the capital construction fund, previously implied that Section 15-10-12, N.D.C.C., was an appropriation. We stated:

Accordingly, it is our opinion that with respect to public moneys contained in the special funds established by Section 15-10-12, that such public moneys have been appropriated pursuant to the requirements of Section 186 of the State Constitution to the respective institutions of higher learning for the use of each such institution; are subject to the control of the Board of Higher Education pursuant to the provisions of Section 6(e) of Article 54 of the Amendments to the State Constitution; and were not a part of or included in the general fund of the State Treasury as of the close of business of June 30, 1979, for purposes of Chapter 87 of the 1979 Session Laws. (1979 N.D. Atty. Gen. Op. p. 6, 13.)

This result, i.e., holding that Section 15-10-12, N.D.C.C., is an appropriation of the special revenue funds of institutions of higher education, would not necessarily apply to other special funds of non-Board of Higher Education institutions.

An analogy can be drawn to the situation that arose in 1980 when the Legislature, pursuant to 1979 N.D. Sess. Laws 243, § 14, appropriated \$16,500,000 from the State Tuition Fund to the public schools of the State. Section 154 of the Constitution (now Art. IX, § 2) provided that the interest and income of the fund was to be apportioned among the

common schools. The question arose on the authority to expend more than the \$16,500,000 as there was money in 'excess' beyond the \$16,500,000.

The Attorney General stated, in an opinion to the executive budget analyst, that:

It is our opinion that Section 154 of the Constitution is a special provision making an appropriation each year of the full amount of the state tuition fund for the benefit of the common schools of the state; that this constitutional appropriation is mandatory and self-executing; and that it is beyond the power of the Legislature to place limitations or restrictions on the amount of the appropriation first made by the Constitution. (1980 N.D. Atty. Gen. Op. p. 112, 115-116.)

And further:

Accordingly, in the event the amount in the state tuition fund during the present biennium shall exceed the amount appropriated by the Legislature, the mandate of the Constitution will prevail and any limitation placed on the constitutional appropriation must yield. (Id. at 118.)

Any possible conflict between the constitutional authority of the Board of Higher Education and Art. X, § 12, of the Constitution which states 'all public money . . . shall be paid out and disbursed only pursuant to appropriation first made by the legislature . . .' can be avoided, however, by holding that Section 15-10-12, N.D.C.C., is an appropriation. It is a statutory rule of construction that conflicting statutes or parts of the same statute are to be harmonized, where possible. *G. W. Jones Lumber Co. v. City of Marmarth*, 272 N.W. 190 (N.D. 1937).

--EFFECT--

This opinion is issued pursuant to Section 54-12-01, N.D.C.C. It governs the actions of public officials until such time as the question presented is decided by the courts.

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